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Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

JOHNSON CONTROLS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

KENNETH R. LOEBEL
PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C.
1555 N. RiverCenter Dr.
Suite 202
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED FOR REVIEW

Is the judgment in *Int'l Union UAW et al. v. Johnson Controls Inc.*, 886 F.2d 871 (CA 7, 1989) and which was reversed by this Court in *Int'l Union UAW et al. v. Johnson Controls Inc.*, reported at 59 U.S.L.W. 4209 (March 20, 1991) entitled to be given res judicata effect so as to bar a litigant's Title VII claim challenging that identical employer's fetal protection policy at one of its other plant locations and where the litigant had not been afforded the opportunity to have presented its proofs and arguments to the district court?

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PETITION FOR A WRIT OF CERTIORARI

Local 322, Allied Industrial Workers of America, AFL-CIO (Local 322 AIW), plaintiff in the district court and appellant in the court of appeals, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls Inc.*, 921 F.2d 732 (7th Cir., No. 90-1259: January 11, 1991).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 921 F.2d 732 and is reproduced at pp. 1a-7a of the separately bound appendix to this *certiorari* petition (hereinafter "Pet. App."). The judgment of the Court of Appeals is reproduced at Pet. App. 8a. The opinion of the United States District Court for the Eastern District of Wisconsin is unpublished and is reproduced at Pet. App. 9a-26a and its judgment is reproduced at Pet. App. 27a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1991 (Pet. App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petitioner's claim before the district court arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The Petitioner's complaint was dismissed in its entirety on the basis that the judgment in *Int'l Union, UAW et al. v. Johnson Controls, Inc.*, 680 F.Supp. 309 (E.D. Wis.) *aff'd* 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S.Ct. 1522 (S.Ct. Dkt. 89-1215, March 26, 1990)[1] constituted res judicata and barred Petitioner from pursuing its claim that Johnson Controls Inc. by introducing a fetal protection policy at its Milwaukee battery plant on March 1, 1983 had denied females of equal employment opportunities in violation of Title VII.

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[1] On March 20, 1991 this Court reversed the Court of Appeals judgment and remanded the case for further proceedings consistent with this Court's opinion, *Int'l Union, UAW et al. v. Johnson Controls, Inc.*, 59 U.S.L.W. 4209, 4215 (March 20, 1991).

STATEMENT OF THE CASE

This case concerns whether Johnson Controls, Inc. ("the Employer" or "the Company") was properly permitted to invoke the equitable doctrine of res judicata to estop Local 322 AIW from continuing to prosecute its claim under Title VII that the Company's fetal protection policy (FPP) had unlawfully discriminated against females at the Company's Milwaukee, Wisconsin battery plant.

The judgment that the Company raised as a defense and claimed constituted res judicata was the judgment entered in *International Union, UAW, et al. v. Johnson Controls, Inc.*, 680 F.Supp. 309 (E.D. Wis. January 21, 1988) ("Johnson Controls I"), *aff'd*, 886 F.2d 871 (7th Cir. Sept. 26, 1989) (en banc) ("Johnson Controls II").[2]

A. Facts.

Local 322 AIW is a labor organization. It represents the production and maintenance employees employed by Johnson Controls at its Milwaukee, Wisconsin plant where batteries have been and continue to be produced.

Prior to March 1, 1983 all employees, females and males, represented by Local 322 AIW were afforded the same rights under a labor contract to use their seniority to either transfer to better paying jobs or to "bump" less senior employees when there was a lack of work. The Company had observed the provisions of the OSHA lead standard, 29 CFR § 1910.1025 as the standard that was to be applied to all of the employees filling all jobs covered under the labor contract the Company had with Local 322 AIW.

On March 1, 1983, the Company unilaterally introduced the FPP during the term of the labor contract that had been entered into on November 21, 1980 and was

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[2] This Court has since reversed the judgment in Johnson Controls II (*see* Footnote 1 *supra*).

to have remained in effect until at least November 9, 1983.[3]

Under the Company's FPP the Company unilaterally determined that certain jobs had become "unacceptable" for fertile females and that no longer would any fertile females be allowed to use their seniority to transfer, bump, or be promoted to such a job. An "unacceptable" job was one where within the prior twelve month period an incumbent employee in that job had but one blood lead level reading in excess of 30 μg/dl or where within the preceding twelve month period there had been but one air lead reading in the area in excess of 30 micrograms.

All fertile females regardless of what their own blood lead level was were totally barred from transferring, "bumping", or being employed in jobs the Company identified at any particular time as being "unacceptable".

The Company admitted in its answers to Local 322 AIW's first interrogatories that "Some jobs which would have been 'unacceptable' under the [FPP] on March 1, 1983, may have become 'acceptable' subsequently, and perhaps vice versa . . . the status of a particular job is determined when there is a question as to application of the [FPP] . . ."[4]

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[3] The FPP that Johnson Controls had introduced at its Milwaukee facility in March 1983 was identical to that which was involved before this Court in the matter of *UAW, et al. v. Johnson Controls, Inc.*, S.Ct. Dkt. No. 89-1215 (March 26, 1990), but for some reason the Company had introduced the FPP at its other plants in 1982. The employees employed at the Company's battery plant located in Milwaukee, Wisconsin were not included in the class as certified by the district court in Johnson Controls I, *see* 680 F.Supp. at 310.

[4] The actual duties performed in the particular job never were such as to be dangerous in and of themselves to the employee performing such duties. What caused the Company to consider a particular job "unacceptable" for fertile females was not the job duties, but whether either of two conditions had existed in the prior 12 month period, i.e., whether any past employee performing that

The Company's FPP also treated all fertile females not on any individualized basis but as if they were all members of a class and all at equal risk of becoming pregnant or having an unplanned pregnancy.

After the Company unilaterally implemented its FPP Local 322 AIW first pursued through arbitration certain grievances that had been initiated by female employees who had been denied their rights under the labor contract to transfer or bump into certain better paying jobs solely due to the Company's claim that such jobs under its FPP had become "Unacceptable" for fertile females.

B. The Proceedings Had Below.

Local 322 AIW in addition to pursuing grievances also initiated a charge of sex discrimination under Title VII with the EEOC on September 17, 1984. On March 12, 1985 Local 322 AIW received a right to sue notice. (Pet. App. 91a)

On March 19, 1985, Local 322 AIW filed its complaint in the district court claiming that the Company's FPP discriminated against females at the Company's Milwaukee battery plant in violation of Title VII's ban on sex discrimination. On May 28, 1985 the district court granted Local 322 AIW's motion permitting Local 322 AIW to file a first amended complaint. (The amended complaint is reproduced at Pet. App. at 52a-91a.)[5]

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job in the prior 12 month period had blood lead level readings in excess of 30 μg/dl *or* whether in that same prior 12 month period there had been one air lead reading above 30 micrograms. If either of those conditions existed the job at that point in time was then "unacceptable" for a fertile female, but if neither of the past conditions any longer existed, the job would then not be "unacceptable".

[5] The reason for the amended complaint was because an arbitrator had denied a grievance of one of the female employees. Local 322 AIW added a new Count II to its original complaint claiming that the award was contrary to public policy and should be vacated (*see* Pet. App. at 48a-51a).

On July 29, 1985 Local 322 AIW moved under Rule 42(a) of the FRCP to consolidate its claim under Count I, with that of an earlier filed claim of the UAW and where the identical FPP was being challenged and the identical defendant was involved and the same federal judge was assigned to both cases. On November 25, 1985, the district court denied Local 322 AIW's motion to consolidate the two claims (Pet. App. 45a-47a). On February 24, 1986, Local 322 AIW again moved under Rule 42(a) of the FRCP to have its claim under Count I consolidated with the proceedings in the UAW case. On September 24, 1986, the district court again refused to consolidate the two cases and it instead stayed the Local 322 AIW action. (Pet. App. 37a-44a)

On October 7, 1986, Local 322 AIW moved under Rule 24 FRCP to be permitted to intervene or be permitted to file an amicus brief in the UAW proceeding in order to demonstrate to the district court why it would be inappropriate to grant the Company's motion for summary judgment in the UAW proceeding without hearing the theories of Local 322 AIW as to why the FPP violated Title VII's ban on sex discrimination. On January 21, 1988, some fifteen (15) months later, the district court issued its order denying Local 322 AIW's motion to intervene or be permitted to file an amicus brief claiming, "[t]his Court seriously doubts what additional 'new' arguments could have been made by the Local [322 AIW] . . ." (Pet. App. 36a) On that same date the district court without ever having heard any evidence or arguments of Local 322 AIW issued its opinion and granted the Company's motion for summary judgment in Johnson Controls I, 680 F.Supp. 309 (E.D. Wis. 1/21/88). ["After carefully reviewing all the submissions from both parties and the law on this issue, it is the Court's conclusion that the fetal protection policy at issue does not violate Title VII, and the defendant's motion for summary judgment is hereby Granted."]

On January 28, 1988 the district court granted the motion of Local 322 AIW to reopen its case and set a status conference to be held. (Pet. App. 34a) On March 11, 1988 Local 322 AIW filed a motion with the Court of Appeals requesting leave to intervene in the proceedings then before it involving the appeal that had been taken by the UAW from the district court's summary judgment in Johnson Controls I. On March 14, 1988 the Honorable Walter J. Cummings, Circuit Judge, signed an order granting Local 322 AIW's motion. Thereafter, Johnson Controls raised objections to Judge Cummings' order of March 14, 1988 and Local 322 AIW requested to supplement the record; and on April 20, 1988, Judge Cummings issued another order granting Local 322 AIW's motion and denying Johnson Controls' opposition thereto.

On October 13, 1988 the district court issued an order staying the Local 322 AIW action that was then pending before it and asserting "Either party may petition to reopen the case, when appropriate, by way of a letter to the Court . . ." (Pet. App. at 33a)

Thereafter, Local 322 AIW was permitted to participate in the proceedings had before the Court of Appeals in Johnson Controls II and it presented its arguments to the Court of Appeals both by oral argument and by written brief. Local 322 AIW sought to have the Court of Appeals vacate the summary judgment granted the Company in Johnson Controls I and to have the UAW proceeding remanded and consolidated with Local 322 AIW's action then still pending before the district court in order to make a more complete record and have the district court make conclusions based on findings of fact instead of conclusions that had been based on unchallenged assumptions.

The Company conceded before the Court of Appeals in Johnson Controls II that the arguments and materials that Local 322 AIW was raising had not been raised or

presented to the district court prior to its granting of summary judgment in Johnson Controls I. The Company invoked a preclusionary principle and argued that the Court of Appeals could not consider those arguments or materials presented by Local 322 AIW because it could only look to the record as it had existed and the arguments that had been advanced to the district court at the time it had granted the Company a summary judgment in Johnson Controls I.[6]

On September 26, 1989, the Court of Appeals issued its opinion in *Johnson Controls II*, 886 F.2d 87 (7th Cir. 1989) (en banc) and on September 28, 1989 filed its Judgment which claimed to have been based solely on the record had in Johnson Controls I. (Pet. App. 30a).

On October 12, 1989 the district court issued an order lifting the stay in the Local 322 AIW action and stating that Local 322 AIW ". . . approached the Court with the position that certain issues remain undecided after the Seventh Circuit's decision. It seeks to demonstrate that Johnson Controls' fetal protection policy constitutes un-

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[6] The written briefs that were submitted to the Court of Appeals in Johnson Controls II have been submitted to this Court as part of the record that was certified to it in *Int'l Union, UAW v. Johnson Controls Inc.*, S. Dkt. No. 89-1215 (March 26, 1990). This Court can take judicial notice of those records that were before it. In the Company's brief to the Court of Appeals, the Company had argued ". . . the AIW attempt(s) to rely upon material and documents not presented to the district court. Of course, this Court can only look to the record as it existed at the time the district court issued its decision granting summary judgment" (citations omitted) (Company Answering Brief to Court of Appeals in Johnson Controls II, p. 23 n.3).

The Company in addition argued, "The AIW has made a number of arguments not included in the UAW brief. For the most part these arguments were not presented to the district court and therefore should not be considered in this proceeding." (Citations omitted) (Company Answering Brief to Court of Appeals in Johnson Controls II, p. 34 and *also see* n.4.)

lawful sex discrimination regarding those issues . . ." (Pet. App. 28a).

On November 11, 1989 the Company and even though it had argued that the Court of Appeals could not consider the arguments or materials presented by Local 322 AIW (*see* Footnote 6 *supra*), requested the district court to dismiss Local 322 AIW's claim on the basis that the claim should be barred by res judicata.

On January 23, 1990, the district court issued its opinion (Pet. App. 9a-26a), and judgment was entered January 24, 1990 (Pet. App. 27a) dismissing Local 322 AIW's complaint in its entirety on the basis that Local 322 AIW was barred by res judicata from continuing to pursue its Title VII claim on behalf of the females employed at the Company's Milwaukee, Wisconsin battery plant.

Local 322 AIW took a timely appeal to the Seventh Circuit Court of Appeals and on January 11, 1991, the Court of Appeals issued its opinion (Pet. App. 1a-7a) and judgment (Pet. App. 8a) affirming the district court's dismissal of the complaint on the basis that res judicata barred Local 322 AIW from continuing to pursue its Title VII claim challenging the Company's FPP.

REASONS FOR GRANTING THE WRIT

The judgment below permitting the Company to invoke the affirmative defense of res judicata to bar Local 322 AIW from having its proofs and theories litigated before the trial court as to why the Company's FPP had violated Title VII represents a major departure from and a conflict with the principles heretofore established by the prior decisions of this Court relative to the proper application of res judicata.

Unless this Court reverses the judgment of the court below the Company will have been permitted to evade its obligation to provide a remedy, under Title VII, to those females it has employed at its Milwaukee, Wisconsin bat-

tery plant and who have suffered monetary losses as a result of the Company's FPP, and even though the judgment in Johnson Controls II, which the Company claimed was a bar has since been reversed by this Court (*see* Footnote 1, *supra*).

Because the judgment below has departed from the principles established by this Court and because this Court has since reversed the judgment in Johnson Controls II, these are both important enough reasons why this case plainly calls for this Court's review.

THE DUE PROCESS RIGHTS OF A LITIGANT ARE ABRIDGED WHEN RES JUDICATA IS APPLIED TO BAR THAT LITIGANT FROM LITIGATING A CLAIM AND WHERE THAT LITIGANT HAD NOT BEEN AFFORDED THE OPPORTUNITY TO PRESENT ITS PROOFS AND THEORIES TO THE TRIAL COURT ON A RECORD THE LITIGANT HAD PARTICIPATED IN MAKING.

The district court recognized that there was no precedent to support the Company's request and stated, "the issue of whether a party that has been allowed to intervene on appeal is precluded from further prosecution of a companion case on the ground of *res judicata* does not appear to ever have been ruled on . . ." (Pet. App. 20a).

This Court, however, has previously laid down requirements or standards that are to be met when the federal courts are requested to apply an estoppel, including an estoppel by means of res judicata to bar a party from litigating a claim.

One of the most important of these standards is "[The requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate . . ." *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 329 (1971). Whether a party has "had a full and fair opportunity to

litigate" must be ascertained only after a careful inquiry has been conducted, *see Brown v. Felsen*, 442 U.S. 127, 132 (1979) ["Because res judicata *may* govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry . . ."]

The district court was aware that Local 322 AIW had never "had a full and fair opportunity to litigate" its proofs and arguments before the trial court because the district court had twice denied Local 322 AIW's earlier motions to consolidate the two cases and also denied Local 322 AIW's motion to intervene or even file an amicus brief while the Company's motion for a summary judgment was still before it in Johnson Controls I.

In light of this Court's recent decision in *Int'l Union UAW et al. v. Johnson Controls Inc.*, 59 U.S.L.W. 4209 (March 20, 1991), this Court has now made it clear that an employer may not discriminate against females simply because they are fertile. However, back when this case was before the district court the legal landscape surrounding Title VII had become somewhat muddled by the decisions of several courts of appeals that had permitted employers to establish employment practices that treated fertile females differently simply because of their fertility and resulted generally in the denial of equal employment opportunities to such females. *See Hayes v. Shelby Memorial Hospital*, 762 F.2d 1543 (CA 11 1984) and *Wright v. Olson Corp.*, 697 F.2d 1172 (CA 4 1982).

Local 322 AIW's proofs and arguments which the Company conceded had not been raised or presented to the district court in Johnson Controls I were: 1) that fertile females are not anywhere near all being at equal risk of having a pregnancy or unplanned pregnancy and therefore each of such females is entitled to be considered on her own individual characteristics and not to be limited

in employment opportunities because she is a member of a class; and 2) that the Company's characterization of what jobs it identified as "unacceptable" for females was neither factually or logically supportable.

The district court stated in Johnson Controls I "The [FPP] policy excludes women who are capable of bearing children from working in jobs where their blood lead level will rise above 30 micrograms" 680 F. Supp. 309, 310. This appears to be a finding of fact but in reality it was nothing more than an assumption and an assumption that didn't appear to have been challenged.

The Company's criteria for establishing a job to be "unacceptable" for fertile females simply had no causal relationship whatsoever to whether that female's blood lead level would rise to above 30 micrograms. Under the Company's criteria a young male employee with little seniority and who while in the job had one blood lead level reading above 30 micrograms in the *prior 12 month period*, would result in that job being unacceptable for all fertile females including a fertile female in her 50's with a great deal of seniority and therefore she would be precluded from "bumping" or transferring into that job and even though her blood lead level was in the low 20 microgram range or lower.[7] The same result would occur if there was but one air lead reading in the area of the job above 30 micrograms *in the entire prior 12 month period* and even though the employee in the job had a blood lead level well below 30 micrograms. That job would still be "unacceptable" for all fertile females under the Company's FPP and a fertile female employee could not bump or transfer into such a job.

Local 322 AIW was prepared to demonstrate through expert testimony that two employees could be working along side of each other in the same job where the air lead level was above 30 micrograms and one employee's

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[7] The facts would also reveal that she was a grandmother and her last child was had some 20 years ago.

blood lead level would be 20 micrograms or less and the other employee's blood lead level could be higher than 90 micrograms.

The reason for the difference in the blood lead levels is neither attributable to the air lead levels or performing the job, but rather is attributable to the individual's own psysiology, hygiene and work practices. There was no evidence to support any finding that blood lead levels have any correlation to the sex of the individual or that females as a class or as individuals will have higher blood lead levels than males have as a class or as individuals.

The importance of the above is that it undercuts the assumption that everyone working in a job that requires the handling of lead and where lead particles will be in the air is going to automatically incur harm to themselves. The fact is that the harm to any individual from lead is incurred only if the lead becomes ingested into the individuals' body system. In other words, working with lead may be dangerous, much like working with dynamite or being an astronaught going into space may be dangerous. If the individual, however, observes the proper hygiene and work practices and wears the proper safety equipment, then there need not be any rise in that individuals' blood lead levels just because the air lead level in that area is above 30 micrograms. It was pointed out in *United Steel Workers of America, etc. v. Marshall*, 647 F.2d 1189, 1259-1260 (C.A. D.C.), *cert. denied*, 459 U.S. 913 (1981) that there simply was no correlation between the air lead levels and the blood lead levels of any individual employees and that the latter was attributable to the variations in the individual worker's own physiology, personal hygiene, and work practices.

Even assuming that it was impossible for the Company to tell which women might become pregnant the fact would nonetheless remain that this would not have justified the Company's excluding fertile females from transferring to any so-called "unacceptable jobs" because

under the Company's FPP the criteria it used for defining what jobs were "unacceptable" for fertile females to transfer or bump into had no logical or causal relationship to an individual female's own physiology, personal hygiene or work practices and her own blood lead level. All fertile females were excluded from transferring or bumping into a job under the Company's FPP where some other employee performing that job in the prior 12 month period had but one blood lead reading in excess of 30 micrograms or where there had been but one air lead reading in excess of 30 micrograms.

The opinion for this Court in *Johnson Controls Inc.* has now made clear that the Company's argument ". . . that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead . . ." has no validity whatsoever under Title VII, *Johnson Controls Inc., supra*, 59 U.S.L.W. at 4214.

However, the legal landscape, back when Local 322 AIW had opted to intervene before the Court of Appeals in Johnson Controls II, was not that clear as evidenced by the district court's opinion in Johnson Controls I. The evidentiary emphasis in Johnson Controls I had focused on whether there was a significant risk of harm to the fetus from lead exposure; whether that risk was substantially confined to the offspring of females, as opposed to male workers; and whether a fetus is more sensitive to lead than a post-natal child. *See Johnson Controls I*, 680 F. Supp. at 310.

What Local 322 AIW had sought to do by intervening before the Court of Appeals was to attempt to show that there were additional issues, proofs and arguments to be presented relative to why the Company's FPP violated Title VII in respect to females other than simply comparing expert medical opinions on whether the risk of harm to a fetus was as great or greater than the risk of harm to the offspring of a male employee, *see Johnson Controls I*, 680 F. Supp. at 310-312. The expert medical

testimony that a male employee's reproductive system could be harmed if that male ingested a sufficient amount of lead into his system was not unimportant. However, its importance lay in the fact that if fertile female employees are viewed as individuals and not simply as members of a class and male employees likewise are viewed as individuals and not as members of a class, then the district court's assumption that there would be a greater risk of harm were the Company to permit a fertile female to perform a job rather than a male to perform that job simply has no evidentiary support and is illogical.

In other words, under the Company's FPP a female employee who happened to be fertile but was in her 50's and had her last child over 20 years earlier and whose blood lead level was below 20 micrograms was barred from transferring or bumping into a higher paying but so-called "unacceptable" job but a far younger male employee with far less seniority and still engaged in having offspring and whose blood lead levels were far in excess of 30 micrograms was permitted to remain or transfer into that higher paying job.

It was these proofs and arguments as well as the proofs and arguments related to the arbitrary criteria that the Company had used to identify a job as being "unacceptable" for all fertile females that caused Local 322 AIW to want to intervene before the Court of Appeals in an effort to demonstrate that the district court had simply not dealt with all the factual issues and theories that really were presented in the case of the Company's FPP and why the district court's judgment in Johnson Controls I should therefore be vacated and the proceeding remanded in order to allow a full and complete record to be made.

The Company conceded that the arguments and materials raised by Local 322 AIW had not been presented to the district court and because of this the Company

had argued, even after Judge Cummings earlier orders had issued, that such materials and arguments could not be considered by the Court of Appeals (*see* Footnote 6, *supra*).

The *opinion* in Johnson Controls II was totally silent as to attributing any arguments or identifying any of the evidentiary materials specifically to Local 322 AIW. However, the final judgment entered in Johnson Controls II was clear and it expressly provided that the Court of Appeals had heard the appeal only on the record made before the district court in Johnson Controls I and not as supplemented by Local 322 AIW (*see* Pet. App. 27a-28a). Such a final judgment was consistent with the Company's preclusionary arguments that it had advanced to the Court of Appeals.

Perhaps, with the benefit of hindsight, Local 322 AIW might not have been as cautious as it was about seeking review, but because the legal landscape was at that time far from clear and because of the importance, in light of the Company's having invoked the preclusionary principle that it did, Local 322 AIW believed that it was necessary for it in order to remove any doubts about its proofs and arguments being properly considered that it would proceed to prosecute its own action which had remained pending before the district court and where it would present such proofs and arguments and which the Company had conceded had not been litigated by it in Johnson Controls I.[8]

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[8] Had Local 322 AIW sought review of the judgment in Johnson Controls II, the Company was able to argue, just as it had before the Court of Appeals, that because the arguments and materials presented by Local 322 AIW had not been presented to the district court and because the Courts of Appeals judgment in Johnson Controls II was based on the record made in the district court, that therefore such matters raised by Local 322 AIW could not be considered by this Court (*see* Footnote 6, *supra*). *Also see Hormel v. Helvering*, 312 U.S. 552, 556-557 (1941).

Local 322 AIW chose to litigate its own claims before the district court because there was a doubt and a doubt raised by the Company as to whether Local 322 AIW had the necessary control to advance the arguments and proofs that it wanted to make in order to challenge the assumptions of the district court in Johnson Controls I. Local 322 AIW did not simply choose to file a new cause of action rather than take an appeal from an adverse judgment. *Cf. Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981).

Several courts of appeals have held that before a litigant can be estopped from litigating its claim that one of the essential elements to be established is that such litigant had control over those proceedings that would permit it to seek meaningful review of the judgment that was claimed to bar the litigant's claim, *see Virginia Hospital Ass'n v. Baliles*, 830 F.2d 1308, 1312-1313 (4th Cir. 1987); *Benson & Ford Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1176 (5th Cir. 1987); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 339 (5th Cir. 1982) (quoting Restatement (Second) of Judgments, 39 Comment C (1982) . . .).

In affirming the district court's judgment to dismiss Local 322 AIW's claim on the basis of res judicata the court of appeals asserted, "that conclusion [the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children . . .] was necessarily based on the whole record before us, including evidence put forward by Local 322 . . ." 921 F.2d at 735 (Pet. App. 6a). With all due respect to the court of appeals this is not what the judgment entered in Johnson Controls II would indicate and in light of the Company's having specifically argued that the materials and arguments presented by Local 322 AIW could not be considered it was hardly unreasonable for Local 322 AIW to conclude that the record for purposes of review re-

mained as it had been before the district court in Johnson Controls I and not as sought to be supplemented by the arguments and proofs advanced by Local 322 AIW.

The doctrine of res judicata was not intended to be used as a sword to prevent the litigation of issues that have not before been litigated but as a shield to shield a party from relitigating issues that it has already litigated. The proofs and arguments sought to be litigated by Local 322 AIW the Company had conceded had not been litigated in Johnson Controls I.

Local 322 AIW's intervention in the appellate proceedings had in Johnson Controls II did not afford it that "full and fair opportunity to litigate." *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 329 (1971) and this, of course, is the ultimate touchstone that is determinative whether a party, such as the Company, was entitled to invoke the affirmative defense of res judicata to bar Local 322 AIW from having its proofs and arguments as to why the Company's FPP violated Title VII fully litigated in the district court and upon a full and complete record having been made.

CONCLUSION

For the above-entitled reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH R. LOEBEL
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER &
BRUEGGEMAN, S.C.
1555 N. RiverCenter Dr.
Suite 202
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Petitioner